

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

**A. ZAHNER COMPANY,
APPELLANT-RESPONDENT
vs.**

**MCGOWAN BUILDERS, INC.,
RESPONDENT-APPELLANT**

DOCKET NUMBER WD78063 (Consolidated with WD78087)

DATE: MAY 24, 2016

Appeal from:

The Circuit Court of Jackson County, Missouri
The Honorable Jack R. Grate, Judge

Appellate Judges:

Division One: Lisa White Hardwick, Presiding Judge, Victor C. Howard, Judge and Gary D. Witt, Judge

Attorneys:

Frederick Ernst, for Appellant-Respondent

Teresa A. Woody, for Respondent-Appellant

MISSOURI APPELLATE COURT OPINION SUMMARY

**MISSOURI COURT OF APPEALS
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A. ZAHNER COMPANY, APPELLANT-RESPONDENT

v.

MCGOWAN BUILDERS, INC., RESPONDENT-APPELLANT

WD78063 (Consolidated with WD78087)

Jackson County, Missouri

Before Division One: Lisa White Hardwick, Presiding Judge, Victor C. Howard, Judge and Gary D. Witt, Judge

A. Zahner Company (“Zahner”) appeals the judgment of the trial court denying prejudgment interest and attorney fees in its breach of contract action against McGowan Builders, Inc. (“McGowan”). McGowan cross appeals the trial court’s ruling that the contract did not unambiguously make receipt of payment from the owner of the project by McGowan a condition precedent to its obligation to pay Zahner and the court’s resultant exclusion of evidence and testimony regarding the contract provision that McGowan alleged created such condition.

REVERSED AND REMANDED

Division One holds:

Because the purchase order contract contained a provision that was unambiguous and constituted a pay-if-paid provision, the trial court’s ruling was erroneous. McGowan was prejudiced by the error because McGowan was deprived of the defense of arguing that owner’s failure to pay McGowan justified McGowan’s nonpayment to Zahner pursuant to the contractual terms of the purchase order. The judgment is reversed and the case remanded for a new trial in which McGowan will be allowed to present evidence and argument based on paragraph 7 of the purchase order contract constituting a pay if paid provision.

Because of our determination of McGowan's cross appeal and the resulting remand for a new trial, there is no need to address Zahner's claim on appeal because, based on our ruling, it has not prevailed, and because Zahner's claim for prejudgment interest and attorney fees will likely need to be re-evaluated anew on remand.

Opinion by: Victor C. Howard, Judge

Date: MAY 24, 2016

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